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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

vs.

HENDRICKS COUNTY RURAL ELECTRIC MEMBERSHIP CORPORATION

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

vs.

MALLEABLE IRON RANGE COMPANY

HENDRICKS COUNTY RURAL ELECTRIC MEMBERSHIP CORPORATION,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD

BRIEF FOR THE HENDRICKS COUNTY RURAL ELECTRIC MEMBERSHIP CORPORATION

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BRIEF FOR THE HENDRICKS COUNTY RURAL ELECTRIC MEMBERSHIP CORPORATION

STATEMENT OF THE CASE

1. The Board found that on May 9, 1977, the "top executive officer" and "General Manager" of the Hendricks County Rural Electric Membership Corporation (Hendricks or REMC) had discharged his personal secretary, Mary Weatherman, because she had signed a petition directed to the REMC's board of directors requesting that they reconsider the board's decision not to reinstate disabled Lloyd Hadley as an employee. Mr. Hadley became disabled in February, 1976, as a result of an employment accident, and in April, 1977, the board notified Hadley that he would not be reinstated as an employee. (P. App. 38a-39a) On the date of her discharge, Weatherman filed an unfair labor practice charge with the National Labor Relations Board, alleging that her discharge violated Section 8(a)(1) of the National Labor Relations Act (Act), 29 U.S.C. 158(a)(1). In addition to contesting the unfair labor practice, Hendricks claimed at the evidentiary hearing and in its Trial Brief that Weatherman was excluded from the coverage of the Act for two separate reasons: (1) As a "confidential employee" in her capactiy as secretary to the General Manager and top executive and operating officer of the employer, and (2) As a person working in "personnel and employment departments." Although the Administrative Law Judge (ALJ) specifically concluded "that Weatherman was not a confidential employee as the Board defines that term," he made no decision as to whether she was excluded from the Act as an employee working in "personnel and employment departments." (P. App. 49a)

However, the ALJ determined that Weatherman opened mail addressed to Hendricks and Dillon except for correspondence from Hendricks' lawyers to the union, kept and processed all insurance claims of employees, typed Manager Dillon's letters and notices as to the dates of labor negotiation meetings, typed minutes of the meetings of the REMC's board of directors including minutes containing references to Hadley's request for reinstatement and to

other personnel matters, and shared an office with Manager Dillon, separated only by a six foot high partition. Additionally, the ALJ stated that Dillon was present at labor negotiation meetings with the union and collected papers relating to labor contract negotiations including copies of positions developed by the REMC's negotiating committee and his notes taken during negotiations; and that Assistant Manager Spencer had testified that while he (Spencer) made determinations of "management policy concerning the interpretations of the labor contract with the IBEW" union, that such determinations were approved by Dillon; and that Dillon interviewed prospective employees and also considered labor relations problems with both union and non-union employees if not first resolved by Assistant Manager Spencer or Office Manager Douglass. (P. App. 45a-47a & N. 10)

Hendricks filed Exceptions to the Decision with the Board including both jurisdictional issues and the ALJ's failure to rule upon the issue of the exclusion of Weatherman from the Act's coverage due to the fact that she was a personnel and employment department employee. The Board adopted the Decision and Order of the ALJ without specifically ruling upon the Exceptions. (P. App. 33a-35a) Thereafter, Hendricks filed a Petition for Review with the U.S. Circuit Court of Appeals for the Seventh Circuit including the review of both jurisdictional issues and the failure of the Board to rule upon the personnel and employment department exclusion. Although concurring that she did not have a "confidential capacity with respect to labor relations policies," the Court of Appeals reversed the Board's Order. (P. App. 26a & 27a) The Court of Appeals after discussing the decision of the Supreme Court in *NLRB v. Bell Aerospace Co.*, 416 U.S. 267 (1974), held that "The legislative history of the Taft-Hartley Act, as interpreted in *Bell Aerospace*, requires the conclusion that *all* secretaries working in a confidential capacity, without regard to labor relations, be excluded

from the Act" and concluded that the ALJ had "limited his factual inquiry to a determination that Weatherman had not acted in a confidential capacity with respect to labor relations." The Court of Appeals remanded the case to the Board "for a determination of whether 'by the nature of [her] duties' she was 'given by the employer information that is of a confidential nature, and that is not available to the public, to competitors, or to employees generally, for use in the interest of the employer.' H.R. 3020 §2 (12)(C), 80th Cong., 1st Sess. (1947)." (P. App. 31a) Additionally the Court stated that "The ALJ also found that Weatherman was not working in a position equivalent to a personnel department employee, a finding which we do not consider clearly erroneous." (P. App. 27a)

2. On October 10, 1979, the Board accepted the Court's remand and advised the parties that they may file "Statements of Position with the Board with respect to the issues raised by the remand." In its Statement of Position, Hendricks stated "that the Board should order a reopening of the proceedings to present further evidence regarding the issues on remand" and specifically pointed out to the Board that the REMC competes with another utility and was involved in litigation cases with that utility during Weatherman's employment. (P. App. 3a) The Board failed to rule upon Hendricks' request to reopen the record on remand, and issued its Supplemental Decision and Order on January 22, 1980, and stated therein that "Accepting the court's criteria for resolving questions of confidential employee status as the law of this case only, we find that Weatherman was not a confidential employee." (P. App. 18a & 19a) Hendricks again filed a Petition for Review with the Court of Appeals, which denied enforcement of the Order stating that "we adhere to everything we said in *Hendricks" I* and holding that the board had erred in not allowing a new evidentiary record and by not applying the Court's standard to define a confidential employee, stating:

The Board did not reopen the proceedings under the different standard, did not take any additional evidence, did not remand the proceedings to the administrative law judge who heard the original evidence, and has sent us the same record we reviewed before. We are asked to enforce an order which purports to apply the new standard to the old record, but actually reapplies the old standard incorporating the labor nexus. (P. App. 7a & 8a)

SUMMARY OF THE ARGUMENT

1A. In adopting the Taft-Hartley Act of 1947, Congress not only intended to exclude all true supervisors from the Act's coverage, but also two separate and distinct categories of employees: individuals "employed in labor relations, personnel, and employment...matters" and confidential employees. The latter category was defined by Congress in Section 2(12)(C) of the House bill as any individual "*who by the nature of his duties* is given by the employer information that is of a confidential nature, and that is not available to the public, to competitors, or to employees generally, for use in the interest of the employer." Both in 1946 and again in 1947, Congress passed legislation in an attempt to prevent the Board's zealous interpretation of the term "employee" from extending the Act's coverage to employees normally considered managerial or aligned with management. Congress desired to insulate the employer from having to rely upon any one "whom, for *any* reason, he does not trust," and to protect the "intimate details of the business that frequently are highly confidential" from labor or from competitors. Although the language containing both of these exclusions was deleted by the conference committee, both the House Conference Report and the summary of Senator Taft indicate the conferees felt the exclusions unnecessary since the Board had treated and will continue to treat such persons as outside the scope of the Act.

Congress passed the Act by large majorities, overriding the veto of President Truman.

B. The Board's exclusion of "confidential employees" has been inconsistent, and many of its pre-1946 decisions relate the term "confidential employee" to persons dealing with labor relations *matters* such as personnel department employees and employees having mere access to personnel files or correspondence. However, prior to and for approximately ten years after the Act's passage, the Board excluded as a separate category employees who were either closely related to or aligned with the management. This category has included private secretaries and clerks to executives, staff assistants to department managers, secretaries and office clerks to managers, secretaries to grievance supervisors, timekeepers and others more closely aligned to management than are other ordinary employees. Not until after 1956, did the Board begin to consistently limit its previously recognized exclusions to those who assist in a confidential capacity to those who formulate, determine and effectuate management policies in the field of labor relations. During the next fifteen years, the Board eroded the confidential exclusions to non-existence, placed the labor relations policy limitation upon the separate exclusion of personnel, labor relations and employment personnel, and finally placed this limitation upon the exclusion of managerial employees.

C. As early as 1966, the Courts recognized that the Board over the years had excluded not only truly managerial employees from the Act but also employees closely related to or aligned with management so as to place the employee in a position of *potential* conflict of interest. The effort of the Board to dramatically increase its jurisdiction generated the detailed review of the legislative history of the Taft-Hartley Act in the early 1970s. The judicial review resulted in the resurrection of a true confidential exclusion with the Courts concluding that Congress had intended to exclude confidential employees

and managerial employees from the Act and had never intended that the exclusion be limited to only those involved in labor relation policy formulation and implementation.

D. The logical application of the true confidential exclusion as adopted by the Seventh Circuit in *Hendricks* is not a pervasive exclusion that will exclude countless numbers of individuals from the Act's coverage. Rather, the congressional exclusionary standard as resurrected by the judiciary merely recognizes the right of employers to have loyal employees in positions of trust who will not have a potential conflict of interest between the employer and other employees. Recent Board decisions graphically portray the Board's total lack of concern with employers' confidential information. Congress' belief that a confidential employee exclusion was necessary since protecting the employer's confidential information and vital secrets "ought not to rest in the administrative discretion of the Board or on the responsibility of whatever union happens to represent the employees" has been proven valid by the Board's decisions in the last ten years. The unreasonableness of the Board's application of its strict standard in *Hendricks* exemplifies the problem foretold by Congress in 1947.

2. The Court erred by holding that the Board had found secretary Weatherman was not working in a position equivalent to a personnel department employee, since the record indicates that no such finding was made by the Board. Indeed, an application of the separate exclusion for employees working in labor relations, personnel or employment departments results in the conclusion that this secretary should have been excluded from the Act's coverage even if the Board's definition of confidential employee is correct. This was the policy of the Board itself from 1940 to 1966, and a different result would discriminate against the small employer who does not have a separate personnel department.

ARGUMENT

I.

CONFIDENTIAL EMPLOYEES ARE PEOPLE WHO RECEIVE FROM THEIR EMPLOYERS INFORMATION THAT NOT ONLY IS CONFIDENTIAL BUT ALSO THAT IS NOT AVAILABLE TO THE PUBLIC, OR TO COMPETITORS, OR TO EMPLOYEES GENERALLY FOR USE IN THE INTEREST OF THE EMPLOYER; AND CONFIDENTIAL EMPLOYEES ARE EXCLUDED FROM THE COVERAGE OF THE NATIONAL LABOR RELATIONS ACT

A. The Legislative Recognition of the Confidential Employee Exclusion

The Congress of the United States in enacting the Taft-Hartley Act of 1947 (Labor-Management Relations Act) expressed its intent to exclude from the Act's coverage both confidential employees and individuals employed in labor relations, personnel or employment matters; and intended to exclude as confidential, people who receive from their employers information that not only is confidential but also that is not available to the public, or to competitors, or to employees generally. Congressman Fred A. Hartley, Jr., writing Report No. 245 from the Committee on Education and Labor accompanying H.R. 3020 to the House of Representatives expressed the displeasure of the Committee with the Board's various and fluctuating interpretations of the term "employees" under the Wagner Act and the evil that Congress intended to correct, stating:

> (B) The next significant change in section 2(3) concerns "supervisors". The bill, by excluding foremen and other supervisory personnel from the

definition of "employee", deprives the Board of *jurisdiction* over them.

The evidence before the committee showed this to be one of the most important and most critical problems. When Congress passed the Labor Act, we were concerned, as we said in its preamble, with the welfare of "workers" and "wage earners", not of the boss. It was to protect workers and their unions against foremen, not to unionize foremen, that Congress passed the act....It was not until about 7 years after Congress passed the Labor Act that anyone asked the Labor Board to establish a unit composed of supervisors. Notwithstanding that in the act Congress had defined as an "employer" "any person acting in the interest of an employer", the Board held, in the first such case, that supervisors in coal mines are "employees", ... [H.R. Rep. 245, 80th Cong., 1st Sess. (1947) at 13]

* * *

Management, like labor, must have faithful agents.— If we are to produce goods competitively and in such large quantities that many can buy them at low costs, then, just as there are people on labor's side to say what workers want and have a right to expect, there must be in management and loyal to it persons not subject to influence or control of unions, not only to assign people to their work, to see that they keep at their work and do it well, to correct them when they are at fault, and to settle their complaints and grievances, but to determine how much work employees should do, what pay they should receive for it, and to carry on the whole of labor relations.

Labor relations people negotiate labor agreements and handle disputes not settled in the shops. Employment and personnel people hire workers, and sometimes assign them to their departments. Plant policemen and guards prevent disorders and report misconduct of employees and of unions and their members. Time-study men help to fix the pace at which employees work and to determine the number

of men the work calls for. Doctors, nurses, safety engineers, and adjusters handle claims for disability benefits and investigate alleged hazards to safety and health.

Other employees handle intimate details of the business that frequently are highly confidential. Some affect the employer's relations with labor. Others affect its relation with its competitors. In neither case should the employee's loyalty be divided. That which affects the company's relations with its competitors certainly ought not to be open to members of a union that deals also with the firm's competitors. [*id.* at 16] (Emphasis added)

* * *

So, by this bill, Congress makes clear once more what it tried to make clear when, in passing the act, it defined as an "employer", not an "employee", any person "acting in the interest of an employer"; what it again made clear in taking up H.R. 2239 in 1943 and in dropping it when the Board decided the Maryland Drydock case, and what, for a third time, it made clear last year in passing the Case bill by a majority of about 2 to 1 and in barely falling short of enough votes to override the President's veto of that bill.

The bill does not forbid anyone to organize. It does not forbid any employer to recognize a union of foremen. Employers who, in the past, have bargained collectively with supervisors may continue to do so. What the bill does is to say what the law always has said until the Labor Board, in the exercise of what it modestly calls its "expertness," changed the law: That no one, whether employer or employee, need have as his agent one who is obligated to those on the other side, or one whom, for <u>*any*</u> reason, he does not trust. [*id.* at 17]

Thus, H.R. 3020, as reported, excluded from the term "employee" "any individual employed as a supervisor" in

Section 2(3), and defined the word supervisor into four (4) separate categories.[1]

Mr. Hartley expressed the Committee's displeasure with the Board stating that "It must be presumed that when Congress passed the Labor Act, it intended words it used to have the meanings that they had when Congress passed the act, not new meanings that, 9 years later, the Labor Board might think up." *id.* at 309. Additionally, in reporting the committee's definition of the term "supervisor" to the House, Mr. Hartley dwelled entirely upon the addition of and definition of the term "confidential employee," noting that he had already discussed the reasons for excluding employees with labor relations nexus (Subsections Ai, Aii, and B).

(12) "Supervisor": In the discussion of the definition of the term "employee," the reasons for

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[1] *Section* 2(1) the term "supervisor" means any individual—

(A) who has authority, in the interest of the employer—

(i) to hire, transfer, suspend, lay off, recall, promote, demote, discharge, assign, reward, or discipline any individuals employed by the employer, or to adjust their grievances, or to effectively recommend any such action; or

(ii) to determine, or make effective recommendations with respect to, the amount of wages earned by any individuals employed by the employer, or to apply, or to make effective recommendations with respect to the application of, the factors upon the basis of which the wages of any individuals employed by the employer are determined, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the exercise of independent judgment;

(B) who is employed in labor relations, personnel, employment, police, or time-study matters or in connection with claims matters of employees against employers, or who is employed to act in other respects for the employer in dealing with other individuals employed by the employer, or who is employed to secure and furnish to the employer information to be used by the employer in connection with any of the foregoing; or

(C) who *by the nature of his duties* is given by the employer information that is of a confidential nature, and that is not available to the public, to competitors, or to employees generally, for use in the interest of the employer.

excluding from that definition persons who act for employers in the employer's dealings with labor have been fully set forth. The substantive language of section 2(12) of the present bill is consistent with that of the Case bill, which passed Congress last year.[2] The only important change concerns confidential employees. These are people who receive from their employers information that not only is confidential but also that is not available to the public, or to competitors, or to employees generally. Most of the people who would qualify as "confidential" employees are executives and are excluded from the act in any event.

The Board, itself, normally excludes from bargaining units confidential clerks and secretaries to such people as these. But protecting confidential financial information from competitors and speculators, protecting secret processes and experiments from competitors, and protecting other vital secrets ought not to rest in the administrative discretion of the Board or on the responsibility of whatever union happens to represent the employees. The bill therefore excludes from the definition of employees persons holding positions of trust and confidence whose duties give them secret information. The bill does not forbid these people to organize. It merely leaves their organizing and bargaining activities outside the provisions of the act. [*id.* at 23]

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[2] The Case bill, as passed, defined three (3) categories of supervisors:

"Supervisory employees: (a) As used in this section the term 'supervisory employee' means an employee whose primary duties consist of:

(1) the direction of supervision of the activities of other employees but who regularly do no productive manual work; or

(2) the computation of the pay of other employees and does not include persons who are selected by productive workers under established practice; or

(3) the determination of the time worked by other employees, or the supervision or administration of the factors on the basis of which the pay of other employees is computed."

Obviously, the House committee intended to exclude "confidential employees" from the definition of "employee" as a type of "supervisor" and intended "confidential employees" specified in Section 2(12)(C) to constitute a different exclusion than the exclusion of those "employed in labor relations, personnel, employment, police, or time-study matters or... employed to act in other respects for the employer in dealing with other individuals employed" as specified in Section 2(12)(B). The subsection (C) exclusion was not limited to labor relations, personnel or employment matters. The House passed H.R. 3020 with Section 2(12) unchanged.

However, since H.R. 3020 as reported and as passed by the Senate[3] did not contain the same definition of the term "supervisor" as in the House bill, a conference committee was established by Congress which included Congressman Hartley and Senator Robert A. Taft among its members. The Report of the Senate Committee on Labor and Public Welfare, written by Senator Taft, had discussed as its only concern in drafting the supervisor exclusion, its desire not to exclude "certain employees with minor supervisory duties" such as "straw bosses, leadmen, set-up men, and other minor supervisory employees." *Senate Rep. No. 105*, 80th Cong., 1st Sess. (1947) 410. Although the Senate's version of the definition for "supervisor" was adopted by the conference committee, both the Statement of the House Managers attached to the Conference Report and Senator Taft's summary in detail regarding the conference committee's report to the Senate, stated that the House bill

[3] Sec. 2. (11) The term "supervisor" means any individual having authority, in the interest of the employer to hire, transfer, suspend, layoff, recall, promote, discharge, assign, reward or discipline other employees, or responsibility to direct them, or to adjust their grievances, or effectively to recommend such action if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment. H.R. 3020 as passed Senate, 80th Cong., 1st Sess. (1947), 74.

had included "(A) certain personnel who fix the amount of wages earned by other employees, such as inspectors, checkers, weighmasters, and time-study personnel (B) labor relations personnel, police, and claims personnel, and (C) confidential employees" and thereafter stated as follows:

> In the case of persons working in labor relations, personnel and employment divisions [departments], it was not thought necessary to make specific provision, as was done in the House bill, since the Board had [has] treated, and presumably will continue to treat, such persons as outside the scope of the act. This is the prevailing Board practice with respect to confidential secretaries as well, and it was not the intention of the conferees to alter this practice in any respect. The conference agreement does not treat time-study personnel or guards as supervisors, as did the House bill. [H.R. Conf. Rep. No. 510, 80th Cong., 1st Sess., 35 (1947); 93 Cong. Rec. 6599 (1947), *Legis. Hist.* at 539 and 1537.]

Thereafter, both reports discuss the resolution of the committee regarding the House Bill's exclusion of guards and time-study employees. "The entire [House Conference] report was submitted to both houses of Congress and accepted on this hypothesis. 93 Cong. Rec. 6392-93, 6535-36 (1947)." *NLRB v. Wheeling Electric Co.*, 444 F.2d 783, 785 (1971) (4th Cir. 1971).[4]

After the conference report with the Statement of the Managers was presented and printed in the Congressional

[4] Similar reviews of the legislative history of the Taft-Hartley Act to determine the intention of Congress regarding the exclusion of confidential employees from the Act's coverage have previously been accomplished by this Court and several Courts of Appeals. *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 279-284 (1974); *NLRB v. Wheeling Electric Co., supra*, at 785; *Peerless of America, Inc. v. NLRB*, 484 F.2d 1108, 1112 (7th Cir. 1973); *Bell Aerospace v. NLRB*, 475 F.2d 485, 490-494 (2nd Cir. 1973); *NLRB v. North Arkansas Electric Cooperative, Inc.*, 446 F.2d 602, 604-607 (8th Cir. 1971).

Record, the House adopted the report on June 4, 1947, by a vote of 320 yeas and 79 nays. Likewise, and after the summary presentation by Senator Taft on June 5, 1947, the Senate agreed to the conference report on June 6, 1947, by a vote of 54 yeas and 17 nays. 93 Cong. Rec. 6548 & 6694, *Leg. Hist.* 899 & 1620. Overriding the veto of the Act by President Truman, the House again passed the bill on June 20, 1947, as did the Senate on June 23, 1947. The House Committee Report of April 11, 1947, the Statement of the Managers attached to the House Conference Report of June 3, 1947, and the Summary in Detail of Senator Taft presented to the Senate on June 5, 1947, all express the congressional belief that the Board had itself excluded from the Act's coverage confidential secretaries as well as labor relations personnel and employment department employees, as separate categories of exclusion. The congressional intent was to exclude three categories of employees from the Act's coverage: true supervisors; labor relations, personnel and employment department employees; and confidential employees. Secondly, the intent of Congress was to exclude as confidential any employee "*who by the nature of his duties* is given by the employer information that is of a confidential nature, and that is not available to the public, to competitors, or to employees generally, for use in the interest of the employer." Realizing that some employees handle confidential information affecting the employer's relations with labor and others handle confidential information affecting its relations with its competitors, Congress believed that "in neither case should the employee's loyalty be divided."

B. The Administrative Erosion of the Confidential Employee Exclusion

The Board's policy in applying the confidential employee exclusion has varied over the years, and at times inconsistent decisions were rendered during the same brief

time frames. The confidential exclusion was co-mingled with the exclusion for managerial employees, and at other times with the exclusion for those employed in labor relations, personnel or employment matters. Mr. Chief Justice Burger expressing the unanimous view of the District of Columbia Circuit Court panel stated that the "Board has not developed clear standards for determining what is a managerial employee," with the Court recognizing that at least two separate categories seem to exist. *Retail Clerks International v. NLRB*, 366 F.2d 642, 644 (D. C. Cir. 1966). In 1941 the Board in *Creamery Package Manufacturing Co.*, 34 NLRB 108, 110 and 111, held that the "possession of important information is of itself insufficient to justify exclusion from the right to collective bargaining" finding several employees not to be confidential since they did not possess information which "relates directly to the problem of labor relations." (Blueprint-machinery operator, draftsmen, reception clerk and telephone operator, assistants to cost accountant, stock record clerks, and typists) However, the Board did exclude a stenographer making reports to the general office stating that "the information which she *might* receive in this manner would appear to be confidential and directly related to the problem of labor relations." Two months later the Board excluded from a unit assistants working closely with the personnel director citing *Creamery, supra*, but as a separate category excluded secretaries of the store managers merely stating that "in the category of confidential secretaries or clerks, the unions seek to exclude the private secretaries of managers." *Montgomery Ward & Co.*, 36 NLRB 69, 72 and 73 (1941); citing *E. P. Dutton*, 33 NLRB, No. 134. The Board excluded an authorization clerk "charged with the custody of the service record cards of all employees" stating only that the "record cards contain confidential data." *Western Union Telegraph*, 38 NLRB 492, 500 (1942).

Several interesting Board decisions appeared in 1943. In *Bendix Aviation Corp.*, 47 NLRB 43, 47, the Board excluded both timekeepers and expeditors without reference to any labor relations nexus and merely noting that "its timekeepers are clerical and its expediters are *closely related to the management.*" Citing *Yale & Towne Manufacturing Co.*, 44 NLRB 1259 (1942), the Board excluded expeditors, stock chasers, hurryclerks and dispatchers from a unit of maintenance and production employees, and also excluded timekeepers and clerical employees without reference to labor relations. *New Britain Machine Co.*, 48 NLRB 263, 266 (1943). Most interesting was the Board's decision that year in *Consolidated Vultee Aircraft Corp.*, 54 NLRB 103, 106 & 107 (1943), excluding the entire labor relations section of the industrial relation department "inasmuch as the record indicates, in each instance, that these employees are either confidential employees, in that they have access to information pertaining to labor relations, or possess supervisory authority." Although equating the confidential exclusion with the exclusion for those employed in labor relations departments, the Board in *Consolidated* then as a separate category excluded staff assistants having "alleged confidential relationship to management" or "alleged supervisory status."[5]

In 1944 the Board excluded stenographers and clerks to a foreman stating that "All matters pertaining to the operation and administration of their respective departments, including confidential communications referring to labor relations, grievances, and other matters of similar import, pass through their hands"; and yet, also

[5] These included staff assistants to the chief and assistant chief of the subcontracting department, the staff assistant to the spares control supervisor in the production control department and a staff assistant to the general foreman in charge of the production stores in the material department, and with no reference to access to labor relations and only recognizing that the subcontracting department chief or his staff assistants had the authority to hire and discharge.

excluded timekeepers stating merely that they had an "intimate and immediate effect upon the setting of wages and costs," and excluded employment department employees who had "free access to all personnel and employment records." *Youngstown Sheet & Tube Co.*, 56 NLRB 559, 561 & 562 (1944). The Board next excluded time-study men whose determinations did not affect earnings of the unit employees holding that "their interests and functions are sufficiently akin to those of management to warrant their exclusion," and also holding they could not form a separate unit. *Yale & Towne Manufacturing Co.*, 60 NLRB 626, 628 & 629 (1945). Therefore, although excluding from units and the Act employees "who in the normal performance of their duties *may obtain* advance information of the Company's position with regard to contract negotiations, the disposition of grievances, or other labor relations matters," *Hoover Co.*, 55 NLRB 1321, 1323 (1944), the Board had also excluded certain types of employees who were neither supervisors nor had access to confidential labor relations matters but nonetheless had "interests and functions which are more closely aligned to those of management than are the interests and functions of the ordinary employees of the Company."[6] *Burke Brewery, Inc.*, 54 NLRB 1061, 1062 (1944).

In *American Smelting and Refining Co.*, 61 NLRB 506, 508 & 509 (1945), the Board excluded the assistant to the safety inspector and personnel director having "access, *in the normal course of his duties*, to confidential personnel records," the head timekeeper having "access to confidential personnel records...as a confidential employee," the manager's secretary having "access to personnel files" only, and the superintendent's secretary handling "all personnel correspondence" only. Likewise,

[6] Citing *Westinghouse Electric Co.*, 45 NLRB 826 at 829 (1942) and noting "The Board has frequently excluded from an appropriate unit employees who are on an intimate relationship with officers of the company.

the Board held that clerks in charge of personnel records occupied a "confidential status with respect to management." *Douglas Aircraft Co., Inc.*, 60 NLRB 876, 881 (1945); and excluded as confidential "all employees of personnel departments or employees otherwise engaged in personnel work, since through access to personnel files, or in the performance of their duties, they acquire information pertaining to confidential labor relations matters." *Aluminum Company of America*, 61 NLRB 1066, 1073 (1945). See also *Inland Steel Container Co.*, 56 NLRB 138, 140 (1944).

However, during the year that the predecessor to the Taft-Hartley Act was passed by Congress but vetoed by President Truman (the Case bill), 92 Cong. Rec. 1070, 5739, 5946, 6674; the Board issued its *Ford Motor Co.* decision, 66 NLRB 1317 (1946) specifically overruling *Yale & Towne Manufacturing Co., supra*, and *Consolidated Vultee Aircraft Corp., supra*. The *Ford* decision came soon after *Packard Motor Car Co.*, 61 NLRB 4 (1945), 330 U.S. 485 (1947), and during a period of intense disagreement between the Board and President Truman on the one side and Congress on the other when "As a result of the Board's ruling in the *Packard* case, both Houses of Congress, by overwhelming majorities, passed the so-called Case bill, exempting supervisors from the operation of the Labor Act. The President vetoed the bill, and the Board continued to unionize foremen at an accelerated pace." H.R. Rep. No. 245, at 14. Thus, while Congress was formulating its intent to exclude several categories of employees from the Act,[7] the Board reversed its own precedents holding that it would exclude "only those employees who assist and act in a confidential capacity to persons who exercise 'managerial'

[7] As noted in H.R. Rep. No. 245, at 13, the House, as early as 1943, was considering a bill to remove foremen from the Labor Act (H.R. 2239, 78th Cong.), which was dropped in 1943 when the Board, in *Maryland Drydock Co.*, 49 NLRB 733, reversed its 1942 decisions which had allowed foremen to join rank and file workers unions.

functions in the field of labor relations." *Ford Motor, supra,* at 1322. Nevertheless, the Board in *Ford, supra,* at 1324, went on to exclude a general clerk noting only that he "handles all group insurance records, approves and pays claims for disability and hospitalization, and passes upon expense accounts of the traveling salesmen."[8] The intent of the Board to limit the types of individuals previously excluded as confidential during its dispute with Congress is revealed by its decision issued in January of 1947, in *Consolidated Vultee Aircraft Corp.*, 71 NLRB 1350, 1363, where the Board reversed its prior exclusion of staff assistants to supervisors without even access to labor relations matters.[9]

Although the Board had thus quickly attempted to restrict the confidential employee category by eliminating prior exclusions of employees with no access to labor relations matters and by stating that access alone was not sufficient, the Board's policy reverted back in some decisions shortly after the 1947 passage of the Taft-Hartley Act. The Board excluded the private secretary to the general manager and president noting that although she did not presently perform duties with respect to matters concerning labor relations, she might in the future perform such duties. *W. K. B. H., Inc.*, 81 NLRB 63, 64 N.2 (1949). It excluded as confidential the secretary to the district manager who did not participate directly in bargaining negotiations but was consulted by the personnel manager, stating that "his secretary will have access to correspondence and other material relating to such

[8] In the case of *Hendricks County REMC* now being reviewed, the personal secretary to the General Manager and chief executive officer handled all group insurance records regarding claims for disability, hospitalization, and medical.

[9] The Board in *Consolidated Vultee II, supra,* included many staff assistants as well as timekeepers in the bargaining unit, while in *Consolidated Vultee I,* 54 NLRB 103, 112 (1943), the Board excluded time-study men and administrative assistants as "closely allied to management."

matters." *Two States Telephone Co.*, 90 NLRB 2008, 2011 (1950). The head cashiers in each of the company's stores were excluded as confidential since they had "access to all confidential memoranda sent to the store manager concerning labor relations policy and all other instructions concerning employment conditions and rates of pay." *Bond Stores, Inc.*, 99 NLRB 1029, 1031, N.4 (1952). In *Star Bush Manufacturing Co.*, 100 NLRB 679, 680 (1952) the Board excluded "the secretary to the Employer's general manager who participates in contract negotiations and other labor relations matters" without making any finding of the secretary's acts regarding or possession of labor relations matters. Likewise, the Board excluded as confidential the secretaries to the order department manager, the production control manager and the plant superintendent. *Minneapolis-Honeywell Regulator Co.*, 107 NLRB 1191, 1192 (1954). Expressing again its desire to overrule cases inconsistent with the definitions established in *Ford Motor Company, supra*, the Board thereafter held:

> Although announcing its intention in the *Ford Motor Company* case to limit the term "confidential" so as to embrace only such employees, the Board has, from time to time since that decision, expanded its view as to what constitutes a confidential employee by designating as "confidential," for example, secretaries to persons involved in the handling of grievances and cashiers having access to labor relation policy data. [*B. F. Goodrich Company*, 115 NLRB 722, 725 (1956).]

Nevertheless, the Board in *B. F. Goodrich* still excluded as confidential the secretaries to the personnel manager and to the office manager, noting merely that the latter had a role in past and future bargaining negotiations and handled grievances from employees. Also in 1956, truck drivers making purchases of produce on routes at pre-established prices were excluded, the Board stating as follows in *Swift & Company*, 115 NLRB 752, 753 & 754:

> It was the clear intent of Congress to exclude from the coverage of the Act all individuals allied with management. Such individuals cannot be deemed to be employees for the purposes of the Act. [Cited in *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 287.]

The normally consistent limitation and erosion of the confidential exclusion seems to have begun ten years after the Taft-Hartley Act of 1947. In 1966, the Board attacked the long-recognized exclusion of persons employed in labor relations, personnel and employment matters by holding that secretaries and clerks who kept time and work records and typed memoranda dealing with personnel matters were not "sufficiently concerned with labor relations matters to be considered confidential employees who should be excluded from the unit" since they did not actually "assist or act in a confidential capacity to persons who formulate, determine, and effectuate management policies in the field of labor relations." *Hotel Employer's Association*, 159 NLRB 143, 150 (1966). See also, *John Sexton & Co.*, 224 NLRB 1341 (1976) (employee typing personnel matters including employee status changes and who files handwritten evaluations and other items in personnel files is not excluded as a confidential employee.) In *Weyerhaeuser Co.*, 173 NLRB 1170, 1172 & 1173 (1968), the secretaries to supervisors who processed employee grievances as the employer's representative on standing joint union-management committees were included under the Act since the supervisors only applied the provisions of the existing bargaining contract to pending grievances and did not actually formulate or determine the labor policies. The culmination of the Board's destruction of the confidential exclusion seemingly occurred in 1972 in *Peerless of America, Inc.*, 198 NLRB 982, 987, wherein the Board held that the company had committed unfair labor practices pursuant to Section 8(a)(1) against the rights of the private secretary to the plant manager on three occasions when she overheard from her desk his

conversations with several supervisors in his private office regarding the union sympathies of other employees during a unionization effort. In 1970, the Board found an unfair labor practice when the manager of one of the company's offices discharged his confidential secretary who had refused to perform her duties during a strike by other employees. *Wheeling Electric Co.*, 182 NLRB 218. While eliminating the confidential employee exclusion, the Board also turned its attention to applying the "labor relations policies" limitation to its long-recognized exclusion of those who "formulate and effectuate management policies by expressing and making operative the decisions of their employer," which was the other category of employees discussed in *Ford Motor Co., supra*, in 1946. *North Arkansas Electric Cooperative, Inc.*, 168 NLRB 921 (1967), 185 NLRB 550 (1970); *Bell Aerospace Co.*, 190 NLRB 431 (1971) and 196 NLRB 827 (1972). With 1978 came the *Hendricks* decision, 236 NLRB 1616 (1978), wherein the Board determined that the personal secretary to the General Manager and chief executive officer of the company was not a confidential employee excluded from the coverage of the Act. These decisions of the Board proved to be the straws which broke the camel's back and generated reviews of the intent of Congress and reversals by the Courts.

C. The Judicial Resurrection of the Confidential Employee Exclusion

The judicial resurrection of the confidential employee exclusion began even while the administrative erosion continued. Oftentimes, the courts discussed this exclusion in connection with the "managerial" exclusion, but at other times the courts discussed the "confidential" exclusion separately. As early as 1954, the Ninth Circuit Court of Appeals determined that the "reports which accompanied the legislative bill which Congress enacted into the Labor Management Relations Act of 1947, made [it] abundantly

clear that a primary objective of Section 2(11) of the Act...was to assure to the employer his right to procure the loyalty and efficiency of his supervisors and managers." *NLRB v. Retail Clerks International*, 211 F.2d 759, 763 (9th Cir. 1954). In 1963, the Fourth Circuit reversed the Board's inclusion of the office clerk who was privy to confidential communications of the district manager regarding performance, pay, and termination recommendations. *NLRB v. Quaker City Life Insurance Co.*, 319 F.2d 690, 694 (4th Cir., 1963). Thereafter, in *Retail Clerks International v. NLRB*, 366 F.2d 642, 644 & 645 (D.C. Cir. 1966), *cert. denied* 386 U.S. 1017, the D. C. Circuit, in an opinion by then Circuit Judge Burger, recognized that although the "Board has not developed clear standards for determining what is a managerial employee" that two tests and categories seem to exist, stating as follows:

> The first is whether, even if they do not supervise other workers, their position with the employer presents a potential conflict of interest between the employer and the workers, *e.g.*, employment interviewers who have authority in hiring, New England Telephone, 90 N.L.R.B. 639 (1950). *This strand of the managerial employee test is often phrased in a more conclusory manner, i.e., that the employee is closely related to or aligned with the management; such a determination, however, also seems to turn on the possibility of a conflict of interest arising, e.g.*, timekeepers and expeditors, Bendix Aviation Corp., 47 N.L.R.B. 43 (1943); an office manager and record keeper who has no confidential information about other employees, Burke Brewery, Inc., 54 N.L.R.B. 1061 (1944).
>
> The Board also excludes from the protection of the Act, as managerial employees, "those who formulate, determine, and effectuate an employer's policies," AFL-CIO, supra, at 973, and those who have discretion in the performance of their jobs, but not if the discretion must conform to an employer's established

> policy, Eastern Camera & Photo Corp., 140 N.L.R.B. 569, 571 (1963) (store managers who could set prices are not managerial). *The rationale for this Board policy, though unarticulated, seems to be the reasonable belief that Congress intended to exclude from the protection of the Act those who comprised a part of "management" or were allied with it on the theory that they were the one from whom the workers needed protection.* (Emphasis added)

Thus, the Circuit Court discovered that the Board had excluded from the protection of the Act a certain "strand of managerial employee" who did not supervise other workers, did not possess confidential information about other employees, and yet did not formulate, determine, and effectuate an employer's policies. Chief Justice Burger noted in discussing this type of managerial employee that "In some instances the test of alliance with management is applied even where a conflict of interest is not apparent."[10] The recognition of the existence and the definition of two distinct cagegories of employees comprising the "managerial" exclusion as set forth in *Retail Clerks, id.*, was adopted by the Seventh Circuit in *Illinois State Journal-Register, Inc. v. NLRB*, 412 F.2d 37, 41 (7th Cir. 1969) and *Westinghouse Electric Corporation v. NLRB*, 424 F.2d 1151, 1158 (7th Cir. 1970), wherein the Court stated that "the fundamental tests to be used in determining whether an individual is such a 'managerial' employee are: (1) whether the employee is 'so closely related to or aligned with management as to place the employee in a position of *potential conflict of interest* between his employer on the one hand and his fellow workers on the other,' and (2) 'whether

[10]Citing *Federal Tel. and Tel. Co.*, 120 NLRB 1652 (1958), buyers; *Diana Shop Spokane, Inc.*, 118 NLRB 743 (1957), credit managers who have authority to grant credit in limited amounts to customers; and *Swift & Company*, 115 NLRB 752 (1956), truck drivers who buy eggs from farmers for the account of the truck driver's employer.

the employee is formulating, determining and effectuating his employer's policies or has discretion, independent of an employer's established policy, in the performance of his duties.'" (Emphasis added). As noted at Page 10, Congressman Hartley stated in the House Report that neither in the case of "highly confidential" information affecting relations with labor or relations with competitors "should the employee's loyalty be divided," and "That which affects the company's relations with its competitors certainly ought not to be opened to members of a union that deals also with the firm's competitors."

However, a thorough analysis of the legislative history of the Taft-Hartley Act itself did not begin until the early 1970s. In *NLRB v. Wheeling Electric Co.*, 444 F.2d 783, 788 (4th Cir. 1971), the Court excluded from the Act's coverage the confidential secretary to an office manager stating:

> A confidential secretary who plights her troth with the union differs in form, but not in substance, from one who holds a union card. Since she cannot formally join the unit, there is nothing incongruous in holding that she cannot "plight her troth" with the unit. Indeed, it seems more consistent to say that if she cannot act in concert by participating in the unit, then she cannot act in concert on an informal basis, or more accurately, that if she does so, it will be without the protection of the Act. Management is entitled to security of its confidential information and may insist upon the loyalty of those employees who have access to it. For this reason, confidential employees cannot be granted the protection afforded ordinary employees under the Act. Like supervisors, "such loyalty cannot be secured if [they] are psychologically allied with, or subject to the pressures of their union on behalf of, the rank and file." Cox, *supra*, [*The Labor Management Relations Act*, 61 HARV. L. REV. 1,] at 5 (1947).

Additionally, the Court found in *Wheeling Electric*, *id.*, at 786, that the Board did not point to a single case in which it had certified a bargaining unit made up entirely of

confidential employees and found that the "treatment of confidential employees by the Board before 1947 could therefore be properly construed by the Congress as it did—that they were not to be afforded the protection of the Act." In *NLRB v. North Arkansas Electric Cooperative, Inc.*, 446 F.2d 602, 607 (8th Cir. 1971), the Court held as follows:

> It is apparent that in passing the Labor-Management Relations Act of 1947, Congress understood that persons working in labor relations, personnel and employment divisions *and as confidential employees* had theretofore been treated as "outside the scope of the Act," and that it was the intention of the conferees this practice be continued under the 1947 amendments. (Emphasis added).

Thus, the Eighth Circuit concluded that "confidential employees" was a separate exclusion from "persons working in labor relations, personnel and employment divisions", with the Court relying upon the conference report submitted to the Senate by Senator Taft and the definition of the term confidential employee as contained in Section 2(12), 93 Cong. Rec. 6548, *Leg. Hist.* 897-900. The Court concluded:

> The legislative history cited above, together with the logical analysis thereof in the recent *Wheeling Electric Company* case, clearly indicate that labor relations and employment division personnel and confidential employees are not intended to be protected by the Act. If none of *these classes of employees* is protected, it is not logical to assume that Congress intended to protect managerial employees who are so closely aligned with management as to be excluded from the bargaining unit and who had not been held to be "employees" by the Board prior to the 1947 amendments. [*id.* at 610] (Emphasis added)

The Eighth Circuit denied enforcement of the Board's order to rehire stating only that the Board's assertion that "there is nothing in the record to suggest that he

participated in the formulation, determination, or effectuation of policy *with respect to employee relations matters*" "not only conveniently ignores our prior holding that Lenox 'assisted in conducted employee training sessions,' but in our view, also improperly limits the class of employees not protected by the Act."[11]

In essence, the judicial resurrection of the confidential "exclusion" was completed in the years 1973 and 1974. The Seventh Circuit in *Peerless of America, Inc. v. NLRB*, 484 F.2d 1108 (1973) (Justice Stevens concurring) adopted the Fourth Circuit's decision in *Wheeling Electric Co., supra*, noting that the *Wheeling* case had recently been approved by the Second Circuit in *Bell Aerospace Co. v. NLRB*, 475 F.2d 485, 494 (1973). *Peerless* reversed the Board's decision finding that the company had thrice violated Section 8(a)(1) of the Act committing an unfair labor practice when the plant manager's confidential secretary overheard his conversations with supervisors regarding the sympathies of other employees during a union organizational campaign. The Court held that the secretary was not protected under the Act. Also in 1973, the Second Circuit issued its second opinion in *Bell Aerospace Co. v. NLRB*, 475 F.2d 485 (1973). The Board in *Bell Aerospace* had held that managerial employers were excluded from coverage

[11] In recognizing that the class of confidential employees is separate from the class of labor relations and employment division personnel, the court stated: "While not controlling, the Court is entitled to give considerable weight to the construction of a statute by the administrative agency entrusted with its execution when that statute has been subsequently considered by Congress and not materially amended." *Red Lion Broadcasting Company v. FCC*, 395 U.S. 367, 381 (1969); *Zemel v. Rusk*, 381 U.S. 1, 8-11 (1965); *Commissioner v. Noel Estate*, 380 U.S. 678, 682 (1965); *NLRB v. Gullett Gin Company*, 340 U.S. 361, 365-366 (1951); *Helvering v. R. J. Reynolds Tobacco Company*, 306 U.S. 110, 114-115 (1939). The court stated that "This is especially true here where Congress enacted an amendment excluding supervisors from coverage after they had been included by Board interpretation but did not make reference to 'managerial employees' who had not been so included."

only if they make "determinations which should be made free of any conflict of interest which could arise if the person involved was a participating member of a labor organization." "This category included not only 'those concerned with management policies in the labor relations area,' but also those having 'responsibility with respect to policies which are inextricably intertwined and of necessity affect or infringe upon the labor relations area.'" After the thorough discussion of the four separate exclusions specified in the House version of H.R. 3020 and the definition of confidential employee contained in House Report No. 245 at 14 and 15, and of Senate Report No. 105 at 4 and 5 by Senator Taft, and of the House Conference Report No. 510 at 35 and 36; Chief Judge Friendly concluded as follows:

> The best we can make of this history is as follows: The Senate had been persuaded that the House definition would have barred from the protection of the Act too many people who should be within it.[12] But neither the Senate, nor the House in yielding to it, thought the exclusion would be limited to persons precisely fitting the Act's definition of "supervisor." It is quite clear—and the Board does not challenge this—that Congress believed "persons working in the labor relations, personnel and employment departments" would be excluded. However, our sense of the situation

[12]Previously, Chief Judge Friendly noted the only concern expressed by the Senate: "But while the Senate Committee was concerned with distinguishing between supervisors vested with 'genuine management prerogatives,' such as the power to hire, fire, or discipline other employees, and minor supervisors such as 'straw bosses, leadmen, [and] set-up men,' it expressed the same concerns that had been voiced by the House Committee over the granting of the Act's protections to supervisory personnel. S. Rep. No. 105, *supra*, at 4-5. The Senate Committee felt that the organization of supervisors had upset the balance of power between labor and management, id., at 3, and it wished to prevent conflicts of interest, resulting in lower productivity, less discipline, and correspondingly higher industrial accident rate, *id.* at 4-5." 475 F.2d 485 at 490.

> is that Congress recognized there were other persons so much more clearly "managerial" that it was inconceivable that the Board would treat them as employees. Surely Congress could not have supposed that, while "confidential secretaries" could not be organized, their bosses could be.[13] In other words, Congress failed to enact the portion of Mr. Justice Douglas' *Packard* dissent relating to the organization of executives, not because it disagreed but because it deemed this unnecessary. [*id.* at 491 & 492]

Noting the Board's decision in 1956 in *Swift & Company*, 115 NLRB 752, 753, later reversed by the Board, the Second Circuit then adopted the exclusion of confidential employees from the Act's coverage presented in "the illuminating opinion of Judge Craven, dealing with a confidential secretary," in *Wheeling Electric, supra*, and the Eighth Circuit's decision in *North Arkansas Electric, supra*, and held as follows:

> The conclusion we reach from all of the foregoing is this: The 1947 Congress clearly believed that at least some "managerial employees" other than "supervisors" were excluded from the protections of the Act.[14] In 1956 the board concluded that the Congress had meant

[13]Footnote 10 of Court. "We think that when the Conference Report referred to 'confidential secretaries,' it used that term with the same meaning which H.R. 3020, as reported, had spelled out for 'confidential employees,' even though in 1946, the Board had narrowed its definition of confidential employees to those "who exercise 'managerial' functions in the field of labor relations." Ford Motor Co., 66 N.L.R.B. 1317, 1322."

[14]Court's footnote 13. Congress may have misapprehended the Board's pre-1947 practice with regard to confidential employees. As indicated in the case cited in fn. 10 [*Ford Motor Company*], the Board had apparently excluded such employees from bargaining units of rank and file personnel but had not ruled that they were unprotected by the Act. Thus, when the Conference Committee stated that the Board had treated these employees "as outside the scope of the Act," it may have been in error. Nevertheless, since Congress' reason for not expanding the definition of supervisor was its belief that existing Board practices made this unnecessary, that intent should be given effect. See *NLRB v. Wheeling Elec. Co.*, 444 F.2d 783 (4th Cir. 1971).

> to exclude all true "managerial employees." This exclusion embraced not only an employee "so closely related to or aligned with management as to place the employee in a position of conflict of interest between his employer on the one hand and his fellow workers on the other" but also one who is "formulating, determining and effectuating his employer's policies or has discretion, independent of an employer's established policy, in the performance of his duties." *Illinois State Journal-Register, Inc. v. NLRB*, 412 F.2d 37, 41 (7th Cir. 1969). *id.* at 494.

The Second Circuit in *Bell Aerospace* had concluded that the Conference Report had referred to the term "confidential secretaries," "with the same meaning which H.R. 3020, as reported, had spelled out for 'confidential employees,'" which was, "any individual (C) who *by the nature of his duties* is given by the employer information that is of a confidential nature, and that is not available to the public, to competitors, or to employees generally, for use in the interest of the employer."

As this Court is certainly aware, both the decision and the rationale of the Second Circuit was basically adopted by this Court in *NLRB v. Bell Aerospace Co.*, 416 U.S. 267 (1974). The major issue decided by the Court was the "question whether all 'managerial employees,' rather than just those in positions susceptible to conflicts of interest in labor relations, are excluded from the protections of the Act." *id.* at 274. Rejecting the "labor relations" limitation, this Court held that the buyers were excluded from the coverage of the Act as the category of "managerial employees" who "formulate and effectuate management policies by expressing and making operative the decisions of their employer." *id.* at 282-285 and 288. This Court adopted the Second Circuit's statement that "surely Congress could not have supposed that, while 'confidential secretaries' could not be organized, their bosses could be," and discussed the Act's history as follows, *id.* at 283 and 284:

> The legislative history of the Taft-Hartley Act of 1947 may be summarized as follows. The House wanted to include certain persons within the definition of "supervisors," such as straw bosses, whom the Senate believed should be protected by the Act. As to these persons, the Senate's view prevailed. There were other persons, however, who both the House and the Senate believed were plainly outside the Act. The House wanted to make the exclusion of certain of these persons explicit. In the conference agreement, representatives from both the House and the Senate agreed that a specific provision was unnecessary since the Board had long regarded such persons as outside the Act. Among those mentioned as impliedly excluded were persons working in "labor relations, personnel and employment departments," and "confidential employees." But assuredly this did not exhaust the universe of such excluded persons. The legislative history strongly suggests that there also were other employees, much higher in the managerial structure, who were likewise regarded as so clearly outside the Act that no specific exclusionary provision was thought necessary. For example, in its discussion of confidential employees, the House Report noted that "[m]ost of the people who would qualify as 'confidential' employees are *executives and are excluded from the act in any event.*" H.R. Rep. 245, p. 23 (emphasis added.)[12] We think the inference is plain that "managerial employees" were paramount among this impliedly excluded group.

The Court specifically recognized that the definition of "confidential employees" in the House Report was not limited to the labor relations area, and therefore concluded that the other class of managerial employees, i.e. those who formulate and effectuate management policies by expressing and making operative the decision of their employer, was not limited to the labor relations area, stating, *id.* at 283 and 284, N. 12:

> The Report stated in reference to "confidential employees": There are people who receive from their employers information that not only is confidential but also that is not available to the public, or to competitors, or to employees generally. *Most of the people who would qualify as 'confidential' employees are executives and are excluded from the act in any event.*
>
> "The Board, itself, normally excludes from bargaining units confidential clerks and secretaries to such people as these." *Ibid.* (Emphasis added by Court)
>
> In 1946 in *Ford Motor Co.*, 66 N. L. R. B. 1317, 1322, the Board had narrowed its definition of "confidential employees" to embrace only those who exercised "'managerial' functions in the field of labor relations." The discussion of "confidential employees" in both the House and Conference Committe Reports, however unmistakably refers to that term as defined in the House bill, which was not limited just to those in "labor relations." Thus, although Congress may have misconstrued recent Board practice, it clearly thought that the Act did not cover "confidential employees" even under a broad definition of that term.

The Court reaffirmed this rationale in *NLRB v. Yeshiva University*, 444 U.S. 672, 682 (1980) noting that the college professors "are 'much higher in the managerial structure' than those explicitly mentioned by Congress, which 'regarded [them] as so clearly outside the Act that no specific exclusionary provision was thought necessary.' 416 US, at 283," and stating at N.16 that "The Board has found decisions of far less significance to the employer to be managerial when the affected employees were aligned with management."[15] Even the minority opinion issued by

[15]Citing *Swift & Co.*, 115 NLRB 752, 753 (1956) (procurement drivers who made purchases for employers); *Firestone Tire & Rubber Co.*, 112 NLRB 571, 573 (1955) (production schedulers); *Peter Kiewit Sons' Co.*, 106 NLRB 194, 196 (1953) (lecturers who indoctrinated new employees); *Western Electric Co.*, 100 NLRB 420, 423 (1952) (personnel investigators who made hiring recommendations); *American Locomotive Co.*, 92 NLRB 115, 116-117 (1950) (buyers who made substantial purchases on employer's behalf).

Mr. Justice White in *Bell Aerospace, supra*, at 304, 306, agreed that "The House Managers' statement accompanying the Conference Committee Report explains that the Act was not amended expressly to exclude labor relations and confidential employees from coverage under the Act, because it was already prevailing Board practice to exclude these employees" and that Congress "expressed a desire to exclude only labor relations *and* confidential employees whom it thought the Board had previously held outside the Act. . . ." Nevertheless, the Board continues to contend that the labor policy limitation should be applied to "those explicitly mentioned by Congress, which 'regarded [them] as so clearly outside the Act that no specific exclusionary provision was thought necessary'" even though the Supreme Court has not so limited even the managerial employee exclusion.

The judiciary had come a full circle from Chief Justice Burger's decision recognizing the Board's exclusion from the Act of two categories of "managerial employees" in *Retail Clerks International v. NLRB*, 366 F.2d 642, 645 (1966), *cert. denied*, 386 U.S. 1017; to this Court's decision in *Bell Aerospace*, that the "conflicts of interest in labor relations" limitation was not applicable to the second category: those who "formulate and effectuate management policies by expressing and making operative the decisions of their employer." The other "strand of the managerial employee" were those "so clearly related to or aligned with management as to place the employee in a position of potential conflict of interest between his employer on the one hand and his fellow workers on the other" and who do not supervise other workers, do not necessarily possess confidential information about other workers, and at times "even where a conflict of interest is not apparent." *Retail Clerks, supra*. This "strand" seems extremely similar to the category intended to be excluded from the Act by Congress: "an individual who *by the nature of his duties* is given by the employer information that is of a confidential nature, and

that is not available to the public, to competitors, or to employees generally, for use in the interest of the employer." "Most of the people who would qualify as 'confidential employees' are executives and are excluded from the Act in any event. The Board, itself, normally excludes from bargaining units confidential clerks and secretaries to such people as these." *NLRB v. Bell Aerospace*, 416 U.S. at 283 and 284 quoting H.R. Rep. No. 245, p. 23. The judiciary recognized that Congress had intended to exclude "confidential employees" from the Act, and that this category is separate from the category of persons employed in labor relations, personnel and employment matters, and that the "confidential employee category" was not limited by a labor relations nexus. The 1947 House Report had stated that in neither the case of employees with confidential labor relations or confidential competitor relations information "should the employee's loyalty be divided" and that "the bill therefore excludes from the definition of employees, persons holding positions of trust and confidence whose duties give them secret information."

In 1979, the Seventh Circuit held that "all secretaries working in a confidential capacity, without regard to labor relations, be excluded from the Act" indicating that the personal secretary to the manager and chief executive officer of Hendricks would be a confidential secretary if "'by the nature of [her] duties' she was 'given by the employer information that is of a confidential nature, and that is not available to the public, to competitors, or to employees generally, for use in the interest of the employer.'" *Hendricks County REMC v. NLRB*, 603 F.2d 25, 29 (7th Cir. 1979) citing H.R. 3020 §2(12)(C), 80th Cong., 1st Sess. (1947) and 416 U.S. at 284 N.12. (P. App. 30a & 31a)

D. The Logical Application of the Confidential Employee Exclusion

The opponents to the recognition of the clear legislative intent and to the judicial resurrection of a premise once recognized but subsequently and methodically decimated by administrative explanation, foretell the Armageddon in labor management relations from the application of the true confidential exclusion. It is doubtful that the Courts of Appeals will boldly embellish the exclusion beyond the congressionally stated purposes for its existence in an effort to "strike a major blow at white-collar unionism" and to exclude "many, if not most, white-collar workers" and many blue-collar employees from the "scope of protection accorded by the Act." The progression of Board decisions in this area since 1957 makes unlikely the vivacious extension of the congressional intent by Board interpretation and application. Indeed, the logical application of the exclusion consistent with the purposes recognized and expressed by Congress merely defines the appropriate line between management and labor. See *Packard Co. v. NLRB*, 330 U.S. 485, 493 (1947), dissenting opinion of Mr. Justice Douglas.

The "confidential employee" definition adopted by the Court below in deference to the Supreme Court's pronouncement in *Bell Aerospace*, excludes only one who (1) by the nature of his [employment] duties, (2) is given by the employer, (3) information that is of a confidential nature, (4) which is not available to the public, or to competitors or to employees generally, (5) for use in the interest of the employer. To invoke the exclusion, the information must not only be confidential in nature, but also cannot be available to either the public, or to competitors or to other employees generally. This limitation of the type of confidential information conforms with Congress' concern for the "intimate details of the business that frequently are highly confidential." H.R. Rep. No. 245, at 16. This limitation is supported by several Board precedents defining the confidential nature of information, as recently discussed by the First Circuit in

Texas Instruments, Inc. v. NLRB, 637 F.2d 822 (1981) at 831.[16]

Additionally, the exclusion only applies to those who by the nature of their duties would be given such information by the employer and for use in the interest of the employer. This recognizes the congressional intent to only "exclude from the definition of employees persons holding positions of trust and confidence whose duties give them secret information" and to provide "in management and loyal to it persons not subject to influence or control by unions." As Congress believed in 1947, "Most of the people who would qualify as 'confidential' employees are executives and are excluded from the Act in any event" and the others are normally "confidential clerks and secretaries to such people as these." H.R. Rep. No. 245 at 16 & 23. Also, this definition recognizes that happenstance receipt of such confidential information does not bring exclusion, and is consistent with the judicial recognition that the Board has excluded employees "so closely related to or aligned with management as to place the employee in a position of *potential* conflict of interest between his employer on the one hand and his fellow workers on the other." *Retail Clerks International, supra*, at 644. Indeed, the Board in several cases between 1940 and 1957 excluded without regards to labor relations the private secretaries and clerks to executives, staff assistants to department managers,

[16] "A second factor to be considered is the confidential nature of the information in the wage survey report. This is not a case involving information gathered by the employees themselves; information already effectively released by the company; or information so generally known in the outside world as to be beyond protection, see *News-Texan, Inc. v. NLRB*, 422 F.2d 381, 386 (5th Cir. 1970); *Southern & Western Lumber Company, supra*, 212 NLRB at 669 [1974]; in which the information was readily accessible to employees, see *Southern & Western Lumber Company, supra*, 212 NLRB at 669; *Ridgely Manufacturing Company, supra*, 207 NLRB at 197; or in which nothing in the nature of the information suggested its confidentiality, see *Southern & Western Lumber Company, supra*, 212 NLRB at 669."

secretaries and office clerks to district office managers, secretaries to supervisors who handled grievances, timekeepers and certain other employees having "interests and functions which are more closely aligned to those of management than are the interests and functions of the ordinary employees of the Company." *Burke Brewery, Inc.*, 54 NLRB 1061, 1062 (1944). In 1973, the Board overruled the Regional Director and excluded from the unit the secretaries to the industrial relations assistant, employment supervisor, maintenance superintendent, zone foreman, production superintendent, and production managers of separate plant facilities, as confidential since the "record supports the conclusion that they assist in the preparation of, or have access to, confidential labor relations information such as the Employer's data in preparation for contract negotiations, minutes of negotiating sessions, and grievance investigation reports" and "although two of the disputed employees testified they did not open their supervisors' confidential mail and could not recall whether they had typed their supervisors' contract modification proposals or strike procedures." *Firestone Tire & Rubber Co.*, 201 NLRB 347 (1973). In fact, as recently as October 2, 1979, the Board acting through the Regional Director of Region Six pursuant to Section 3(b) of the Act, after discussing the *Hendricks'* standard, specifically excluded from the unit "executive secretaries" including, but not limited to, all secretaries to corporate officers. *G. C. Murphy Co. and United Steelworkers of America*, Case No. 6-RC-8583; Decision, at 6. (P. App. at 16 in Transcript)

The Board has cited three cases for its proposition that a conflict exists between the circuits. The most noted is *Union Oil Company of California v. NLRB*, 607 F.2d 852 (9th Cir. 1979), wherein the Court at 853 held that computer operators performed duties of a purely clerical nature and were not confidential "Because there is substantial evidence that the computer operators acted as record custodians for persons who do not formulate *or*

implement labor policy." Thus, the Ninth Circuit did not adopt the exact standard advocated by the Board, and stated that "More significant is the fact that the computer operators were under the supervision of Marquardt, who was responsible for computer operations, not labor relations." Furthermore, these computer operators might very well still be non-confidential under the *Hendrick's* standard since the actuarial statistics, wage and capital and operating expense information seems to have been readily available to numerous employees, and they did not have the close relationship to management. In *NLRB v. Allied Products Corp.*, 548 F.2d 644, 648-649 (6th Cir. 1977), the Court recognized that it had previously applied the standard for confidentials now argued by the Board, but held that the Board had erred by "incredibly" including in the bargaining unit the personal secretary to "the general manager and chief labor relations administrator of the plant," indicating its decision was "in spite of those precedents and recognizing the narrow scope of our review." More importantly, the Court reversed the inclusion of the division manager's secretary holding that "Although he is not directly responsible for the Company's relationship with the Union, and although he does not formulate, determine and effectuate company labor relations policy, nevertheless, he does formulate, determine and effectuate company-wide management policies which critically affect labor relations." Thus, the Sixth Circuit seems to have recognized the inequitable result from a strict application of the Board's confidential employee standard, which likewise occurred by its application in *Hendricks.*

In fact, the Board's extremely restrictive interpretation in the last ten years and the resulting removal from management of individuals whose loyalty is required in order for business to function, generated the thorough analysis of this area by the judiciary and the reversals of the Board's holdings. (See previous discussion of *Peerless of*

America, supra, and *Wheeling Electric, supra*). The failure of the Board to recognize the employer's right to loyal and confidential employees and to protect confidential information now seems to be pervasive. In *Texas Instruments, Inc. v. NLRB, supra*, at 829-833, the First Circuit reversed the Board's holding in *Texas Instruments, Inc.*, 247 NLRB No. 37 (1980) that the employer had committed an unfair labor practice by discharging employees who were exercising their Section 7 rights by distributing during a union organization campaign confidential company information regarding wages in violation of a valid rule prohibiting deliberate disclosure. Stating that the Board's determination was contradictory to its own precedent "that employees are entitled to use for self-organization purposes information and knowledge which comes to their attention in the normal course of work activity and association but are not entitled to the Employer's private or confidential records," the Court held that the conduct of the employees was clearly not protected activity.[17] In *Peavey Company*, 249 NLRB 853 (1980), the Board found a Section 8(a)(1) unfair labor practice when the vice president told a secretary that she was a confidential employee and could not engage in union

[17]Citing *Ridgely Manufacturing Co.*, 207 NLRB 293, 296-97 (1973); *NLRB v. Florida Steel Corp.*, 544 F.2d 896, 897 (5th Cir. 1977); *Clearwater Finishing Co.*, 203 F.2d 938 (4th Cir. 1953); and concluding: "we disagree with the Board's conclusion that TI was prohibited, as a matter of law, from enforcing its security rule with respect to conduct such as occurred here, *i.e.*, its employees' deliberate disclosure of confidential wage survey material, gathered for management purposes and marked "strictly private," that had come to the employees' attention irregularly, outside proper channels. Contrary to the Board's ruling, we do not believe the employees' conduct as described was activity protected by the NLRA. It follows that TI's rule prohibiting deliberate disclosure of confidential company information, which the Board correctly held to be valid on its face, could be validly applied on these facts to prohibit and penalize dissemination of the information in question." [*id.* at 829] Since Texas Instruments dealt exclusively with the Department of Defense, many of its documents were classified as "strictly private."

found that even contending that an employee is confidential can bring a violation determination. Such decisions certainly dramatize the need for a meaningful and clear definition of the term "confidential" employee which cannot be made meaningless by the Board's "labor relations policies" limitation and its interpretation thereof. Such a definition recognizing the line between management and labor and the right of the employer to have certain loyal employees was drafted and intended by Congress, and has been recognized by this Court in *Bell Aerospace, supra,* and by the Seventh Circuit below in *Hendricks.* The evil which Congress had feared and intended to eradicate by providing for the exclusion of this category of employee in 1947, is well demonstrated by the results of Board decisions ignoring this exclusion, including its decision in *Hendricks.*

The Board in *Hendricks* concluded that the personal secretary to "General Manager" and "top executive officer" Dillon "was not a confidential employee as the Board defines that term" in that her "' duties do not involve her in a confidential capacity with his responsibilities' with respect to labor policies." (P. App. 49a and 37a). The Board stated that "it is questionable whether Dillon falls into the category of 'persons who formulate, determine and effectuate' labor policies in the conjunctive sense tended by the Board in *B. F. Goodrich, supra,*" even though finding that he was present at all labor negotiation meetings, kept at his desk papers relating to labor contract negotiations including copies of positions developed by the REMC's negotiating committee and his notes taken during negotiations, interviewed all prospective employees, and considered labor relations problems concerning both union and non-union employees if the problems were not first resolved by the assistant manager or of the office manager. (P. App. 47a and N. 10). Secretary Weatherman herself

personally testified that Dillon was the principal operating officer of the REMC and "had general responsibility for all of the labor relations of all of the employees, Union employees as well as those in the office." (J. A. 14) Her opinion was consistent with the testimony of Assistant Manager Spencer[18] and Manager Dillon.[19] General Manager Dillon's functions regarding labor relations *matters* were obviously greater than those of either the general manager or the division manager whose personal secretaries were excluded in *Allied Products Corp., supra*, or the employment supervisor, maintenance superintendent, foreman, and plant production managers whose secretaries were excluded in *Firestone Tire, supra*, for mere access to labor matters. Similar to the facts in *Peerless, supra*, secretary Weatherman's desk was in the same room with Manager Dillon's desk separated only by a six foot high partition. As her regular employment duties, she opened mail to Hendricks and Dillon except for correspondence from Hendricks' lawyers to the Union, kept and processed all insurance claims for employees, typed Manager Dillon's letters and notices as to the dates of labor negotiation meetings and typed minutes of the meetings of the REMC's Board of Directors, including minutes containing references to personnel matters and Hadley's request for reinstatement which generated the

[18]Q. Who was the one that determined management policy concerning interpretations of the Labor Contract with the IBEW?
A. Basically it could come through me first with the approval of Wally Dillon. I would have to say that Wally was.
Q. Who would make the final decision?
A. Wally Dillon.
Q. Who carried out and effectuated these management policies?
A. Wally Dillon or if he would ask me to then I would do so. (J. A. 20)

[19]Dillon testified that he interviewed prospective employees, fired employees along with his staff, fulfilled the labor relations policies formulated by the Board of Directors and resolved labor relations problems not "ir[illegible] out" by staff. (J. A. 23 & 24)

protest to the Directors by her and other employees.[20] (P. App. 45a and 46a) Although not having confidential duties "with respect to labor policies," this secretary did have duties regarding personnel matters, and had access to and even obtained information regarding labor relations matters in her capacity to the individual having the ultimate responsibility to fulfill the labor policies. Nevertheless, the strict application by the Board of its definition of confidential employee limited to labor policy deprives chief executive officers and chief operating officers of loyal executive secretaries.[21] For example, in *NLRB v. Los Angeles New Hospital*, 640 F.2d 1017, 1023 (1981), the Ninth Circuit affirmed the Board's reversal of the ALJ's decision which had held that the secretary to the assistant hospital administrator in charge of fiscal affairs was a confidential employee and had no rights under the Act since she had access to confidential data and even typed "memoranda to the Hospital's personnel director regarding wage raises and evaluations by department heads of certain employees; a memo to an employee's file regarding his termination; and other internal management memoranda regarding payroll and other matters."

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[20]Secretary Weatherman testified that in March, 1977, she and her husband had gone to the home of REMC Director Lydick, the chairman of the committee investigating Lloyd Hadley's request for reemployment, on Hadley's behalf. Although first testifying that she did not know Lydick was the chairman until the night of her meeting or of the committee until typing the March, 1977, Board Minutes, she then admitted typing the February 8, 1977, minutes containing the committee information. (J. A. 9, 13, 14 & 15, Tr. Vol. II, 6) She also agreed that she worked in connection with Manager Dillon in processing medical and disability insurance forms and making sure that the employees received the proper insurance benefits, including the disability statement from Lloyd Hadley's physician. (J. A. 6 & 14).

[21]The record is void of evidence regarding this secretary's duties and access to other confidential information of the employer since, as noted by the Court below, the Administrative Law Judge restricted the record to personnel files and the Board upon remand failed to reopen the proceedings for additional evidence but merely made the "gratuitous conclusion that the Company 'is a cooperative, and that all members *presumably* have access to [its] documents'" based upon Manager Dillion's statement that the Company had "nothing to hide from the *members*." (P. App. 7a & 8a).

The Board has even inconsistently applied its own definition of "confidential employee" by more strictly interpreting the "labor relations policy" limitation in discharge and other unfair labor practice cases, than it does in determining bargaining units. In *Los Angeles New Hospital, supra, North Arkansas Electric Cooperative, supra,* and *Hendricks County REMC, supra,* the Board determined that the individuals were not confidential, while in *Burke Brewery, supra, W. K. B. H., Inc., supra, Firestone Tire & Rubber Co., supra,* and *G. C. Murphy Co., supra,* it excluded the same type of individuals from bargaining units. The Eighth Circuit noted in *NLRB v. North Arkansas Electric Cooperative,* 412 F.2d 324, 326 at N.4 (1969) that "The cases involving the exclusion of non-supervisory employees from a bargaining unit as 'managerial employees' are legion" citing several cases including *Bendix Aviation Corp., supra,* and *Rural Electric Co., Inc.,* 130 NLRB No. 799 (1961) wherein the Board had excluded the electrification advisor from the unit, even though it now was including the North Arkansas Coop electrification advisor under the Act in this discharge case. Discussing this inconsistency in its second decision, *NLRB v. North Arkansas Electric Cooperative,* 446 F.2d 602, 609-610 (1971), the court held:

> In the Board's second decision in this case, it concedes that there has been a lack of clear definition of the "managerial employee" category which it has created.[4] It indicates that an employee may not have the requisite community of interest with other employees to be included with them in a proposed unit, but still be an employee entitled to the protection of the Act as a section 2(3) "employee." We find nothing in the Act or its legislative history to indicate Congress intended the word "employee" to have one definition for the purpose of determining a proper bargaining unit and another definition for the purpose of determining which employees are protected from being fired for union activity. (Citing *NLRB v. Wheeling Electric Co., supra*)

Secretary Weatherman was not a member of the bargaining unit existing at Hendricks (P. App. 38a N.2) and "Nothing therein contained [Act] can be interpreted as evidence of a purpose to protect employees who are not members of any bargaining unit and who are more closely aligned with management than they are with the members of the bargaining unit." *id.* at 608.

II.

THE COURT IMPROPERLY APPLIED THE EXCLUSION FROM THE NATIONAL LABOR RELATIONS ACT OF PERSONS WORKING IN LABOR RELATIONS, PERSONNEL AND EMPLOYMENT DEPARTMENTS, BY CONCLUDING THAT THE BOARD HAD FOUND THAT THE PERSONAL SECRETARY TO THE CHIEF EXECUTIVE OFFICER WAS NOT A PERSONNEL DEPARTMENT EMPLOYEE

The Circuit Court below concluded that "The ALJ also found that Weatherman was not working in a position equivalent to a personnel department employee, a finding which we do not consider clearly erroneous." (P. App. 27a) However, the Decision of the Board made no such finding, and in fact, specifically notes only that the Company "advances two legal defenses to the claimed violation here" stating that "The first is that Weatherman was confidential employee and therefore not protected by the Act" and that "Respondent's final contention is that Weatherman's signing of the petition did not constitute Section 7 activity because the petition concerned the plight of a former employee." (P. App. 44a & 49a) Perhaps the Circuit Court's belief that the Board had ruled upon the other exclusionary rule argued by the Company is because the Board has comingled the exclusions in prior decisions.

Prior to and long after the passage of the Taft-Hartley Act in 1947, the Board itself consistently recognized the Congress' intended subsection (B) exclusion for individuals "employed in labor relations, personnel, employment... matters." As noted previously, the Second Circuit

concluded "It is quite clear—and the Board does not challenge this—that Congress believed 'persons working in the labor relations, personnel and employment departments' would be excluded." *Bell Aerospace v. NLRB*, 475 F.2d 485, 491 (1973). See also *Wheeling Electric, supra*, at 786 and *North Arkansas Electric Cooperative, supra*, at 607. Indeed, the Board did until the mid 1960s include individuals employed in personnel or employment matters.[22] The Board's desire to terminate both exclusions by the co-mingling of these two separate exclusionary categories is well demonstrated by its argument at page 44 of its Brief[23] and by its argument at N.54 that Weatherman,

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[22] *Montgomery Ward & Co.*, 36 NLRB 69, 72 & 73 (1941); *Youngstown Sheet Tube Co.*, 56 NLRB 559, 561 & 562 (1944); *Aluminum Company of America*, 61 NLRB 1066, 1073 (1945) ("all employees of personnel departments or employees otherwise engaged in personnel work"); *B. F. Goodrich Co.*, 115 NLRB 722, 725 (1956) (secretaries to personnel manager and office manager). However, in 1966, the Board placed the labor relations policy limitation upon the exclusion of persons employed in labor relations, personnel and employment matters by holding that secretaries and clerks who kept time and work records and typed memoranda dealing with personnel matters were not "sufficiently concerned with labor relations matters to be considered confidential employees". *Hotel Employers Association*, 159 NLRB 143 at 150 (1966). See also *John Sexton & Co.*, 224 NLRB 1341 (1976). These latter cases were in disregard of the Board's established policy to exclude employees with any function regarding personnel or employment matters even if not working exclusively in a personnel department. *American Smelting & Refining Co.*, 61 NLRB 506, 509 (1945) (exclusion of manager's secretary with "access to personnel files"); *Western Union Telegraph Co.*, 38 NLRB 492, 499 (1942) (exclusion of authorization clerk having custody of service records cards of all employees).

[23] "Although the ALJ, whose decision was adopted by the Board, did not discuss Weatherman's status as a "personnel department employee" separately from her status as a "confidential employee" with a "labor nexus," the relevant portion of the ALJ's decision (Pet. App. 44a-49a) clearly shows that, in finding that Weatherman did not have any access to confidential labor-related information, he also found that her duties with respect to personnel matters (such as they were) were insufficient to affect her status as an employee entitled to the full protection of the Act."

even as a personnel employee, must have access to labor relations information of a strategic or otherwise sensitive nature that could compromise her employer's dealings with the union, to be excluded. Obviously, this is the same definition which the Board espouses for the "confidential employee" exclusion.

The Board's policy prior to and for nearly 20 years after Taft-Hartley was to exclude any employees working in a personnel or employment department or with *access* to personnel information since these employees "necessarily are conversant with information concerning labor relations." *Babcock & Wilcox Company*, 52 NLRB 900, 903 (1943). Having only 35 employees, Hendricks did not have a separate personnel director or personnel department. Nevertheless, small businesses should be accorded the same rights regarding this exclusion as America's massive corporations such as B. F. Goodrich Company and Allied Products Corporation. Secretary Weatherman shared the same room with the chief executive officer who had the ultimate authority to hire, discipline and terminate employees and administered their employment benefits. Although the Supreme Court should ordinarily acquiescence in the conclusion of fact made by a lower court, the Court will review the conclusion if it is not supported by the evidence in the record and constitutes a glaring error. *Harkin v. Brundage*, 276 U.S. 36 (1928); *Besser Manufacturing Co. v. United States*, 343 U.S. 444 (1952).

CONCLUSION

The judgments of the Court of Appeals should be affirmed insofar as the enforcement of the Board's orders were denied and regarding the Court's definition of the "confidential employee" exclusion, but should be reversed insofar as the Court's conclusion that the Board determined Weatherman not to be working in a position equivalent to a personnel department employee.

Respectfully submitted,

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